No. 00430

Supreme Court, U.S.
FILED
OCT 10 2000
CLERK

# In The Supreme Court of the United States

**FORD MOTOR COMPANY and MAZDA MOTOR CORPORATION,**

***Petitioners,***

**v.**

**CHARLES KING, as Administrator of the Estate of Patti Ann King; AMANDA SUE KING, by and through her next friend Charles King; and ASSOCIATED INSURANCE COMPANIES,**

***Respondents.***

**ON PETITION FOR A *WRIT* OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## REPLY BRIEF

**Rosewell Page, III**
**E. Duncan Getchell, Jr.***
**David H. Worrell, II**
**William H. Baxter, II**
**MCGUIREWOODS LLP**
**One James Center, 901 East Cary Street**
**Richmond, Virginia 23219-4030**
**(804) 775-1000**

**B. Todd Thompson**
**Millicent A. Tanner**
**THOMPSON & MILLER PLC**
**220 West Main Street, Suite 1700**
**Louisville, Kentucky 40202**
**(502) 585-9900**

***Counsel of Record for Petitioners***

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

11pp

# TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

ARGUMENT ..... 2

I. This Court should allow the Sixth Circuit to evaluate its decision under the preemption analysis set forth in Geier. ..... 2

II. Prior decisions by this Court indicate that this case is ripe for application of its GVR procedure. ... 4

CONCLUSION ..... 7

TABLE OF AUTHORITIES

**FEDERAL CASES**

Geier v. American Honda Motor Co., 120 S. Ct. 1913 (2000) ..... i, 1, 3-4, 7

King v. Ford Motor Co., 209 F.3d 886 (6th Cir.), *reh'g denied*, 2000 U.S. App. LEXIS 15297 (6th Cir. June 12, 2000) ..... 2-3

Lawrence v. Chater, 516 U.S. 163 (1996) ..... 2, 4-6

Stutson v. United States, 516 U.S. 193 (1996) ..... 2, 4-5

**FEDERAL REGULATIONS**

49 C.F.R. § 571.208 ..... 2-4

**FEDERAL COURT RULES**

6th Cir. R. 41(a) ..... 1, 7

## INTRODUCTION

Respondents contend that the United States Court of Appeals for the Sixth Circuit "recognized the precise point which this Court definitively established in Geier,[1] but found it not to be applicable to this case," and speculate that "if the Geier case had been decided prior to the decision of the Court of Appeals in this case and had been brought to the Court's attention, it would have been distinguished." (Br. Opp'n at 13) (internal footnote added). They also assert that this Court should give no weight to Sixth Circuit's decision to stay the mandate under 6 Cir. R. 41(a). All of these arguments are unavailing.

Despite Respondents' statement that Count II of their Complaint "referred to this specific vehicle (1992 Ford Escort) and not to vehicles in general," (Br. Opp'n at 3), it is apparent that Respondents pled and tried their case through a combination of preempted and non-preempted theories. That they now stress in their Brief in Opposition the non-preempted components of their case-in-chief, (*id.* at 4-9), does not alter the fact that the case was tried in part on a theory barred by Geier.

Respondents' suggestion that the Sixth Circuit's decision to stay the mandate was "ambiguous" *per se* because it was issued in the form of a "summary ruling" is equally unmerited. (*Id.* at 14.) Local Rule 41(a) of the Sixth Circuit provides an unambiguous standard that requires an "independent determination" that "a petition for writ of certiorari would present a substantial question and that there is good cause for a stay." The ground for stay urged upon the Sixth Circuit was the fitness of this case for GVR treatment. (Appellants' Mot. Stay Mandate Pending Filing

---

[1] Geier v. American Honda Motor Co., 120 S. Ct. 1913 (2000).

Pet. Writ Certiorari at 2-4.) Granting the stay was therefore not ambiguous unless one engages in the unwarranted speculation that the Sixth Circuit violated its own rule.

Finally, Respondents cite excerpts from this Court's decisions in Stutson v. United States, 516 U.S. 193 (1996), and Lawrence v. Chater, 516 U.S. 163 (1996), to bolster their argument that the GVR procedure should not be used in this case. (Br. Opp'n at 15-16.) However, when these excerpts are read in context, Ford respectfully submits that the criteria set forth therein fully support the application of this Court's GVR procedure here.

## ARGUMENT

I. This Court should allow the Sixth Circuit to evaluate its decision under the preemption analysis set forth in Geier.

The opening sentence in ¶ 19 of the Complaint states "[t]hat at the time of design, manufacture and sale of the Escort the Defendants knew or should have known that the restraint system which automatically engaged the shoulder belt, but required the front seat occupant to manually attach the lap belt, was misleading and unreasonably dangerous." (Br. Opp'n at 11a.) It is beyond reasonable dispute that this statement is not limited in scope to the 1992 Ford Escort, (*id.* at 3), but instead attacks a choice of design permitted under 49 C.F.R. § 571.208 ("FMVSS 208") and is thus in direct conflict with FMVSS 208.

Respondents do not dispute that Ford's chosen design met the requirements of FMVSS 208. *See* King v. Ford Motor Co., 209 F.3d 886, 891-92 (6th Cir.), *reh'g denied*, 2000 U.S. App. LEXIS 15297 (6th Cir. June 12, 2000) (noting that "a passive system [automatic seat belts or air bags] for frontal crash protection, manual belts for lateral

crashes and rollovers, and a warning system" was one of the options allowed under FMVSS 208). Moreover, in focusing this Court on their non-preempted claims attacking the implementation of this design, Respondents do not refute Ford's statement that their experts also generically attacked this design choice as defective. (*Compare* Br. Opp'n at 5-9, *with* Pet. Writ Certiorari at 4.) Under Geier, those claims were preempted.

While the Sixth Circuit held that Respondents' claims were not preempted in part because of the savings clause in the Safety Act, King, 209 F.3d at 892, this Court later concluded in Geier that "FMVSS 208 sought a gradually developing mix of alternative passive restraint devices for safety-related reasons" and decided that a state-law tort claim which "would stand as an 'obstacle' to the accomplishment of that objective" would be preempted. Geier, 120 S. Ct. at 1928. Therefore, the savings clause was beside the point. *See id.* at 1919 ("Nothing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations.").

There is no explicit explanation to be found in the opinion below why the Sixth Circuit felt it could hold that Respondents' claims were not preempted because they had questioned Ford's implementation of the design rather than the basic design choice when the record clearly demonstrated that they also had criticized the permitted design choice. King, 209 F.3d at 892 ("'[P]laintiffs' position was not that the design choice . . . was inherently defective . . . .'"). The explanation is not the one offered by Respondents that the court simply applied correct law to mistaken facts. The court of appeals was clearly apprised to the state of the record on appeal and on motion for panel rehearing. It seems therefore that the Sixth Circuit was acting on some calculation that the purpose of preemption was adequately served if the

preempted part of the case was somehow overshadowed by the non-preempted part.

Because the logic of Geier strongly suggests that there can be no *de minimis* exception to preemption based on the relative stress placed on a preempted theory in an individual case, this Court should exercise the GVR procedure to allow the Sixth Circuit an opportunity to evaluate this case in light of Geier, particularly given the agreement of the Sixth Circuit that a substantial question is presented for GVR by Ford's Petition for Writ of Certiorari.

II. Prior decisions by this Court indicate that this case is ripe for application of its GVR procedure.

Respondents maintain that this case is not a candidate for GVR treatment because this Court concluded in Stutson that "'[j]udicial efficiency and finality are important values'" and held that "'GVR power should not be exercised for "mere convenience."'" (Br. Opp'n at 15) (quoting Stutson, 516 U.S. at 197). They also assert that GVR would be improper because the "standard" set forth in Lawrence requires this Court to deny outright Ford's Petition for Writ of Certiorari. (*Id.* at 15-16) (quoting Lawrence, 516 U.S. at 167). These arguments misconstrue this Court's analysis in both of those cases.

Although Respondents do correctly quote the Stutson decision, they have taken this excerpt entirely out of context. In Stutson, 516 U.S. at 197-98, this Court observed that

> Judicial efficiency and finality are important values, and our GVR power should not be exercised for 'mere convenience.' [citation omitted] 'But dry formalism should not sterilize procedural resources which Congress has made available to the federal courts.' [citation omitted] In this case, as in

> Lawrence v. Chater, a GVR order guarantees to the petitioner full and fair consideration of his rights in light of all pertinent considerations . . . . In this case, as in Lawrence, a GVR order both promotes fairness and respects the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments that were not previously before it.
>
> Accordingly . . . the petition for a writ of certiorari [is] granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 123 L. Ed. 2d 74, 113 S. Ct. 1489 (1993).

Similarly in Lawrence, 516 U.S. at 166-67 (emphasis in original), this Court explained that

> Title 28 U.S.C. § 2106 appears on its face to confer upon this Court a broad power to GVR: 'The Supreme Court or any other court of appellate jurisdiction may . . . vacate . . . any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances.' In his dissent issued today in this case and in Stutson v. United States, *post*, p. 193, another case in which we issue a GVR order, Justice Scalia contends that 'traditional practice' and 'the Constitution and laws of the United States' impose 'implicit limitations' on this power. *Post*, at 178. We respectfully disagree. We perceive no textual basis for such limitations . . . . Insofar as Congress appears to have authorized such action, we believe that this Court has the power to remand to a

lower federal court any case raising a federal issue that is properly before us in our appellate capacity.

Our past practice affirms this conclusion. Although, as Justice Scalia's dissent explains . . . the *exercise* of our GVR power was, until recent times, rare, its infrequent early use may be explained in large part by the smaller size of our certiorari docket in earlier times. Regardless of its earlier history, however, the GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices. We have GVR'd in light of a wide range of developments, including our own decisions. [citations omitted]

This practice has some virtues. In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the '[p]otential for unequal treatment' that is inherent in our inability to grant plenary review of all pending cases raising similar issues. [citations omitted] Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

When this case is examined in the context of these two precedents, it is apparent that GVR is warranted to allow the Sixth Circuit to consider the propriety of allowing jurors to weigh preempted theories in light of Geier. As noted *supra*, this conclusion becomes especially compelling because the Sixth Circuit has practically acquiesced to GVR in this case through its "independent determination" here that this "petition for writ of certiorari would present a substantial question" based upon its suitability for GVR treatment. 6 Cir. R. 41(a).

## CONCLUSION

WHEREFORE this Petition should be granted, the decision below vacated, and the case remanded for further proceedings in light of Geier v. American Honda Motor Co., 120 S. Ct. 1913 (2000).

Respectfully Submitted,

FORD MOTOR COMPANY AND
MAZDA MOTOR CORPORATION

Rosewell Page, III
E. Duncan Getchell, Jr.*
David H. Worrell, II
William H. Baxter, II
McGUIREWOODS LLP
One James Center
901 E. Cary Street
Richmond, Virginia 23219-4030
(804) 775-1000

B. Todd Thompson
Millicent A. Tanner
THOMPSON & MILLER PLC
220 West Main Street, Suite 1700
Louisville, Kentucky 40202
(502) 585-9900

*Counsel of Record